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19 UNITED STATES DISTRICT COURT
20 NORTHERN DISTRICT OF CALIFORNIA
21 (SAN FRANCISCO DIVISION)

22 IN RE: CATHODE RAY TUBE (CRT)
23 ANTITRUST LITIGATION

Case No. 07-5944 SC
MDL No. 1917

24 This Document Relates to:

25 *Electrograph Systems, Inc., et al. v.*
26 *Hitachi, Ltd., et al.*, No. 11-cv-01656;

27 *Stoebner, et al. v. LG Electronics, et al.*,
28 No. 11-cv-05381;

Siegel v. Hitachi, Ltd., et al., No. 11-cv-
05502;

Best Buy Co., Inc., et al. v. Hitachi, Ltd., et
al., No. 11-cv-05513;

**DEFENDANTS' JOINT MOTION TO
ADOPT PORTIONS OF THE REPORT
AND RECOMMENDATIONS
REGARDING DEFENDANTS'
MOTIONS TO DISMISS DIRECT
ACTION COMPLAINTS**

Date: August 23, 2013
Time: 10:00 a.m.
Judge: Hon. Samuel Conti
Special Master: Hon. Charles A. Legge,
U.S. District Judge (Ret.)

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1 *Target Corp, et al. v. Chunghwa Picture*
2 *Tubes, Ltd., et al.*, No. 11-cv-05514;
3 *Interbond Corporation of America v.*
4 *Hitachi, et al.*, No. 11-cv-06275;
5 *Office Depot, Inc. v. Hitachi Ltd., et al.*,
6 No. 11-cv-06276;
7 *CompuCom Systems, Inc. v. Hitachi, Ltd., et*
8 *al.*, No. 11-cv-06396;
9 *Costco Wholesale Corporation v. Hitachi,*
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11 *P.C. Richard & Son Long Island Corporation,*
12 *et al. v. Hitachi, Ltd., et al.*, No. 12-cv-02648;
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INTRODUCTION

Pursuant to Rule 53(f)(2) of the Federal Rules of Civil Procedure, the Order Appointing Special Master (Docket No. 302), and the Court's May 9, 2013 Order Granting Stipulation Regarding Special Master's May 2, 2013 Report and Recommendation on Motions to Dismiss Direct Action Complaints (Docket No. 1666) ("Report"), the undersigned Defendants hereby submit their Motion to Adopt Portions of Special Master Legge's Report.

First, the Report was correct in recommending that the Court dismiss the DAPs' claims for lack of antitrust standing under the laws of California, Washington, Arizona, Illinois, and Michigan. The Defendants made a *prima facie* showing of the application of the principles of AGC to the laws of the five states raised in this motion. Furthermore, to the extent any of the DAPs seek recovery for purchases of finished products that merely incorporate CRTs, as opposed to standalone CRTs, they cannot satisfy AGC's antitrust injury requirement. Special Master Legge correctly determined that he did not need to address the additional deficiencies regarding the DAPs' compliance with AGC's requirements and the DAPs' claims under the relevant five states should be dismissed without leave to amend, as any amendment would be futile.

Second, the Report was correct in recommending that the Court dismiss the DAPs' claims under the Massachusetts Consumer Protection Act. The Court has, on two different occasions, properly dismissed claims for failure to comply with the requirements of the Massachusetts Consumer Protection Act, and the DAPs fail to provide any legitimate reason for this Court not to do so again. The DAPs have failed to provide the required written demand letters 30 days prior to filing a complaint, as required by the statute.

Third, the Report was correct in recommending that the Court dismiss the DAPs' claims under the Washington Consumer Protection Act. The case law interpreting the Washington Consumer Protection Act has never permitted an indirect purchaser to attain direct purchaser standing by utilizing any of the federal *Illinois Brick* exceptions, as the

1 DAPs suggest. Therefore, the Court should reject the DAPs' invitation to broaden the
2 standing requirements under the Washington Consumer Protection Act.

3 **Fourth**, the Report was correct in recommending that the Court grant the Defendants'
4 motion to dismiss the Polaroid Plaintiffs' claim for unjust enrichment. The Polaroid
5 Plaintiffs have not alleged an unjust enrichment claim under the laws of any particular state
6 or states in their complaint. They thus fail to meet the pleading requirements of Rule 8(a)(2)
7 of the Federal Rules of Civil Procedure of making a "short and plain statement of the claim."
8 The Report correctly recognized that the Polaroid Plaintiffs must, at a minimum, identify the
9 state law(s) under which their unjust enrichment claim arises, rather than leave the Court and
10 the Defendants to surmise which state law(s) they wish to invoke.

11 **Fifth**, the Report was correct in recommending that the Court grant the Defendants'
12 motion to dismiss Circuit City's California claim for unjust enrichment. The majority rule in
13 California is that no freestanding cause of action for unjust enrichment exists under
14 California law, which has also been recognized by the Northern District of California and
15 other courts. Circuit City has adequate legal remedies at law under the California Cartwright
16 Act and Unfair Competition Law, so equitable remedies are not available to it. As this Court
17 has held, equitable relief is unavailable to a plaintiff where an adequate remedy at law may
18 exist, even at the early stages of the litigation. Thus, the Report was correct in
19 recommending that Circuit City's claim for unjust enrichment under California law be
20 dismissed.

21 **Sixth**, the Report was correct in recommending that the Court dismiss with prejudice
22 the DAPs' claims under Nebraska and Nevada law based on purchases predating those states'
23 *Illinois Brick* repealer amendments. Prior to the 2002 *Illinois Brick* repealer, Nebraska's
24 antitrust statute did not allow indirect purchasers to sue for damages. Furthermore,
25 Nebraska's *Illinois Brick* repealer does not apply retrospectively. Therefore, the DAPs'
26 claims under Nebraska's antitrust statute based on purchases made before July 20, 2002 (the
27 date the repealer amendment became effective) should be dismissed. Similarly, Nevada
28 courts would not have allowed indirect purchasers to sue under Nevada's Unfair Trade

1 Practices Act before its 1999 *Illinois Brick* repealer amendment and the repealer amendment
 2 does not apply retroactively to claims that accrued before its effective date of October 1,
 3 1999. The Report thus correctly recommends the dismissal of claims by the DAPs under the
 4 Nevada statute based on purchases made before October 1, 1999.

5 For the above reasons, and as more fully discussed below, these recommendations
 6 should be adopted and the Defendants' motion to dismiss on these grounds should be
 7 granted.

8 ARGUMENT

9 **I. THE REPORT PROPERLY DETERMINED THAT THE DAPS LACK** 10 **STANDING IN FIVE STATES AT ISSUE UNDER THE ASSOCIATED** 11 **GENERAL CONTRACTORSTEST**

12 Special Master Legge's recommendation that the Court dismiss the DAPs' claims for
 13 lack of antitrust standing under the laws of California, Washington, Arizona, Illinois, and
 14 Michigan was correct and should be adopted. While those five states have repealed the
 15 categorical bar against indirect purchaser suits established in *Illinois Brick Co. v. Illinois*,
 16 431 U.S. 720 (1977), the DAPs must still demonstrate that they have "antitrust standing for a
 17 particular claim" under the test articulated in *Associated Gen. Contractors v. Cal. State*
 18 *Council of Carpenters*, 459 U.S. 519, 537-544 (1983) ("AGC"), which is an "analytically
 19 distinct" issue. See, e.g., *In re DRAM Antitrust Litig.*, 516 F. Supp. 2d 1072, 1087 (N.D. Cal.
 20 2007) ("DRAM I"); *Illinois Brick*, 431 U.S. at 728 n.7. As Special Master Legge properly
 21 recognized, "AGC is a separate principle developed by the United States Supreme Court,"
 22 Report at 10, setting forth a threshold requirement that every antitrust plaintiff must satisfy.
 23 AGC, 459 U.S. at 535 n.31.

24 The DAPs have objected to Special Master Legge's Recommendation on two
 25 principal bases. First, they assert that Special Master Legge erred in applying AGC under
 26 Arizona, Illinois, and Michigan law (conceding that it does apply under California and
 27 Washington law — the other two states at issue). Second, they contend that even if AGC
 28 does apply, they have established antitrust standing under the AGC factors, which include:

1 “(1) the nature of the plaintiff’s alleged injury; that is, whether it was the type the antitrust
2 law were intended to forestall [antitrust injury]; (2) the directness of the injury; (3) the
3 speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity
4 in apportioning damages.” *Lucas Auto. Eng’g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d
5 1228, 1232 (9th Cir. 1998) (internal citations omitted); *AGC*, 459 U.S. at 538-545. The
6 DAPs further contend that Special Master Legge should have analyzed each of the factors in
7 determining that the DAPs lacked antitrust standing, rather than find the DAPs’ lack of
8 antitrust injury dispositive. As detailed below, the DAPs are wrong on all counts, and
9 Special Master Legge’s well-reasoned recommendation should be adopted.

10 **A. AGC Applies To The DAPs’ Claims Under California, Washington,**
11 **Arizona, Illinois, And Michigan Law**

12 The DAPs do not contest Special Master Legge’s finding that AGC applies to their
13 claims under California and Washington law. *See* DAPs’ Objections to Report and
14 Recommendation Regarding Defendants’ Joint Motion to Dismiss Direct Action Complaints
15 at 5-6 (Dkt. No. 1708) (May 31, 2013) (“DAPs’ Br.”). They maintain, though, that Special
16 Master Legge erred by also applying the AGC test under Arizona, Illinois, and Michigan law.
17 *Id.* The DAPs rely upon other cases in this district that have stated that it would be “wrong”
18 for a court “in *ipse dixit* style . . . to pronounce a blanket and nationwide revision of all state
19 antitrust laws.” *Id.* at 6 (citing *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp.
20 2d 1011, 1026 (N.D. Cal. 2007) (“GPU I”). Special Master Legge did no such thing,
21 however, and the Defendants have never advocated such a position. Rather, the Defendants
22 have moved narrowly only as to five of the seventeen states at issue in the DAPs’ complaints,
23 and only as to those states that have either (i) expressly applied AGC in determining antitrust
24 standing under state law;¹ or (ii) enacted harmonization provisions stating that their states’

25
26 ¹ **Michigan:** *Stark v. Visa U.S.A., Inc.*, No. 03-055030, 2004 WL 1879003, at *2-4 (Mich.
27 Cir. Ct. July 23, 2007) (applying AGC and holding that indirect plaintiff’s “derivative and
28 remote injuries” do not support a finding of antitrust standing); *Whitesell Int’l Corp. v.*
Whitaker, No. 05-518716-CZ, 2007 WL 6741070 (Mich. Cir. Ct. July 31, 2007) (“The court
must also consider the five factors set forth in [AGC] . . .”); **Illinois:** *Cnty. Of Cook v.*

1 antitrust statutes be construed in accordance with federal law (*e.g.*, with *AGC*).² Based upon
2 this authority, Special Master Legge appropriately concluded that the Defendants “ma[d]e a
3 *prima facie* showing of the application of the principles of *AGC* to the laws of the five states
4 raised in this motion.” Report at 11.

5 The Defendants’ *prima facie* showing continues to stand essentially un rebutted, as the
6 DAPs have once again failed to provide the Court with any relevant contrary case law from
7 the jurisdictions at issue with respect to antitrust standing. *See* Report at 11 (noting that
8 “Plaintiffs’ opposition provides little discussion of the issues” surrounding the application of
9 *AGC* to the laws of the states at issue). This is a critical omission, for as the DAPs
10 themselves recognize, “[s]tanding under each state’s antitrust statute is a matter of that state’s
11 law.” DAPs’ Br. at 6 (citing *GPU I*, 527 F. Supp. 2d at 1026). As was the case in briefing
12 before Special Master Legge, however, the DAPs provide no authority at all from either
13 Michigan or Illinois in which a state court has rejected *AGC*. And while the DAPs cite two

14 *Philip Morris, Inc.*, 817 N.E.2d 1039, 1045 (Ill. App. Ct. 2004) (citing *AGC* in applying the
15 “direct injury” doctrine); *see also O-Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060,
16 1066 (7th Cir. 1997) (“Federal antitrust standing rules apply under the Illinois Antitrust
17 Act”); **Arizona**: *Luscher v. Bayer AG*, No. CV-2004-014835 at 1-2 (Ariz. Super. Ct. Sept.
18 14, 2005) (RJN, Ex. G) (citing Arizona’s harmonization provision and applying an *AGC*
19 analysis to claims under the Arizona Antitrust Act). The Defendants provided similar
20 authority to Special Master Legge in both California and Washington, which the DAPs no
21 longer contest. *See* Defendants’ Joint Notice of Motion and Motion to Dismiss and for
22 Judgment on the Pleadings as to Certain Direct Action Plaintiffs’ Claims and Memorandum
23 of Law in Support (Dkt. No. 1317) (Aug. 17, 2012) at 24.

24 ² **Michigan**: Mich. Comp. Laws Ann. § 445.784 (2012) (“It is the intent of the legislature
25 that in construing all sections of [the Michigan Antitrust Reform Act], the courts shall give
26 due deference to interpretations given by the federal courts to comparable antitrust statutes
27”); **Illinois**: 740 Ill. Comp. Stat. 10/11 (2013) (“When the wording of this Act is
28 identical or similar to that of a federal antitrust law, the courts of this State shall use the
construction of the federal law by the federal courts as a guide in construing this Act”);
Arizona: Ariz. Rev. Stat. § 44-1412 (courts applying the Arizona Uniform State Antitrust
Act “may use as a guide interpretations given by the federal courts to comparable federal
antitrust statutes”); *see also Luscher*, No. CV-2004-014835, at 1 (RJN, Ex. G) (citing the
federal guidance clause in the Arizona Antitrust Act as its sole justification for relying upon
an *AGC* analysis).

1 Arizona state cases, both merely stand for the unremarkable proposition that Arizona allows
 2 actions by indirect purchasers; they do not hold that Arizona courts would not follow the
 3 harmonization provision contained in the Arizona Antitrust Act in applying AGC. DAPs' Br.
 4 at 5-6 (citing *Bunker's Glass Co. v. Pilkington PLC*, 75 P.3d 99, 106 (Ariz. 2003) and
 5 *Friedman v. Microsoft Corp.*, 141 P.3d 824, 828 (Ariz. Ct. App. 2006)).³ On the contrary, at
 6 least one Arizona case expressly applied AGC in dismissing a suit brought against synthetic
 7 rubber manufacturers by indirect purchasers of end products containing the synthetic rubber.
 8 *See Luscher*, No. CV-2004-014835 (Defendants' Request For Judicial Notice In Support Of
 9 Defendants' Joint Motion To Adopt Portions Of The Report and Recommendations
 10 Regarding Defendants' Motion to Dismiss Direct Action Complaints ("RJN) Ex. G) ("[AGC]
 11 provides guidance in resolving the issues in this case.")).⁴

12 Because they have no state authority on point, the DAPs continue to maintain that
 13 there was not a "clear directive" from the states at issue because the Defendants' cited
 14 authority did not all stem from "the state's legislature or highest court." DAPs' Br. at 5.⁵

16 ³ The Court in *Bunker's Glass* in fact notes that Arizona's appellate courts have consistently
 17 regarded federal interpretations as dispositive in interpreting the Arizona Antitrust Act. 75
 18 P.3d at 106. And, there is merely a passing reference in *Friedman* to class counsel's ability
 19 to survive a motion to dismiss. 141 P.3d at 828. As Special Master Legge noted, variant
 20 results regarding antitrust standing can be shaped "by the specific pleadings before [the
 21 court] in each case." Report at 11. The Court in *Friedman* did not provide any reference to
 the specific pleadings at issue, or otherwise indicate that Arizona would not apply AGC
 antitrust standing requirements.

22 ⁴ The named plaintiff found to lack antitrust standing in *Luscher* is the same plaintiff
 23 purportedly representing the Indirect Purchaser Plaintiff class in Arizona in the MDL, Brian
 A. Luscher.

24 ⁵ The cases cited by the DAPs are themselves inconsistent as to what would constitute such
 25 "clear directive." Compare *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d
 26 1085, 1097 (N.D. Cal. 2007) ("*GPU II*") (requiring express guidance from a state's highest
 27 court) with *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1151 (N.D. Cal.
 28 2009) ("*Flash*") (finding a state's intermediate appellate courts to be binding, absent
 "convincing evidence that the state's supreme court likely would not follow it.") (emphasis
 added).

1 Yet the DAPs do not and cannot explain why state law directly on point, or a state
 2 harmonization provision, would not be sufficient.⁶ As Special Master Legge properly found
 3 in rejecting this extreme position, “*existing* state law, whether it is by the highest court or by
 4 an intermediate court, is the applicable authority.” Report at 11 (emphasis in original); *see*
 5 *also* *DRAM I*, 516 F. Supp. 2d at 1095 (“While the cases do not emanate from the states’
 6 highest courts, they *do* emanate from courts with jurisdictional authority over the individual
 7 states in question, which courts are called upon to interpret the individual state laws at issue
 8 with more frequency and regularity than this court.”). Indeed, this Court has already looked
 9 to intermediate appellate authority in concluding that *AGC* applied under California state
 10 law. *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 738 F. Supp. 2d 1011, 1023 (N.D. Cal.
 11 2010).⁷ Special Master Legge’s approach is correct because the relevant inquiry is whether
 12 the courts of the state at issue would apply *AGC* antitrust standing principles, and if the
 13 state’s highest state court has not yet decided the issue, a federal court must look for
 14 guidance to state intermediate appellate and other court decisions. *See Dimidowich v. Bell &*

16 ⁶ While the DAPs acknowledge that Illinois has a harmonization provision, they maintain
 17 that federal decisions need only be applied by Illinois courts if they are found “persuasive.”
 18 DAPs’ Br. at 7 (citing *Baker v. Jewel Food Stores, Inc.*, 823 N.E.2d 93, 101 (Ill. App.
 19 2005)). Defendants, however, have cited both Illinois law expressly applying *AGC*, *see*
 20 *supra* n.1, as well as the harmonization provision itself, which states that Illinois’ courts
 21 “shall use the construction of the federal law by the federal courts as a guide in construing”
 22 the Illinois Antitrust Act. See 740 Ill. Comp. Stat 10/11 (2012). Similarly, Michigan’s
 23 harmonization provision states that “[i]t is the intent of the legislature that in construing all
 24 sections of [the Michigan Antitrust Reform Act], the courts shall give due deference to
 25 interpretations given by the federal courts to comparable antitrust statutes” Mich.
 26 Comp. Laws Ann. § 445.784 (2012).

27 ⁷ The DAPs contend that this Court, in ruling on Defendants’ motion to dismiss the Indirect
 28 and Direct Purchaser Class Complaints, has suggested implicitly that *AGC* does not apply
 under Michigan and Arizona law by stating that *AGC* did apply in certain other states (*i.e.*,
 Iowa, Nebraska, and California). *See* DAPs’ Br. at 5 (citing 738 F. Supp. 2d at 1023). But
 that decision concerned separate allegations, and did not provide any analysis or reasoning
 as to why *AGC* might apply in California but not Arizona, Michigan or Illinois (which was
 not even at issue in the MDL). As explained herein, courts in each of these three states like
 California have applied *AGC* principles in determining antitrust standing.

1 *Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986); *Giles v. Gen. Motors Acceptance Corp.*, 494
2 F.3d 865, 872 (9th Cir. 2007).

3 Indeed, Special Master Legge rightly adopted the well-reasoned, state-by-state
4 analysis conducted by Judge Hamilton in *DRAM I*, 516 F. Supp. 2d at 1084–93, and *In re*
5 *DRAM Antitrust Litig.*, 536 F. Supp. 2d 1129, 1135 (N.D. Cal. 2008) (“*DRAM II*”). Notably,
6 in making this state-by-state determination, Judge Hamilton specifically applied *AGC* to
7 claims brought under Michigan and Arizona law, just as Special Master Legge did. *See*
8 *DRAM I*, 516 F. Supp. 2d at 1095. And, belying the DAPs’ claims that *DRAM* is an
9 “outlier,” *see* DAPs’ Br. at 7, a federal court in Michigan itself recently surveyed the case
10 law and endorsed the approach to this issue taken by Judge Hamilton (and Special Master
11 Legge here), dismissing indirect purchaser plaintiffs’ state law claims for failure to
12 demonstrate antitrust standing, including under Arizona, California, and Michigan state law
13 (*i.e.*, three of the five states at issue here). *See In re Refrigerant Compressors Antitrust Litig.*,
14 No., 2:09-md-02042, 2013 WL 1431756, at **8–10 (E.D. Mich. April 9, 2013) (finding
15 *DRAM I* to be “the most persuasive of the decisions relied on by the parties,” and holding
16 that *AGC* should apply to those states that have “trial court and appellate court decisions”
17 applying *AGC*, and/or that have “harmonization provisions”). The district court in Michigan
18 is particularly well-situated to determine that *AGC* should apply as a matter of Michigan law,
19 and thus should be accorded significant weight.

20 The DAPs, by contrast, rely upon a few decisions from this district, including *In re*
21 *Flash*, in which “neither party ha[d] provided the Court with the requisite, individualized
22 analysis on a per state basis to enable the Court” to “predict[] how a state’s highest court
23 would rule regarding the applicability of *AGC* to state law antitrust claims.” *Flash*,
24 643 F. Supp. 2d at 1153. As a result, the *Flash* Court “decline[d] to undertake the back-
25 breaking labor involved in deciphering the state of antitrust standing in each of those states
26 on this motion [including Arizona and Michigan].” *Id.* Because the *Flash* Court was not
27 provided with the type of “individualized” authority set forth herein, it is misleading for the
28 DAPs to contend that *Flash* “declined to find that *AGC* applied to, *inter alia*, Arizona and

Michigan claims.” DAPs’ Br. at 6. Moreover, the few decisions from this District that have been “reticent” to apply the *AGC* test on a state-by-state basis did not pronounce a general rule that *AGC* does not apply under state law. *See, e.g., Flash*, 643 F. Supp. 2d at 1150-53. One of these courts simply chose to put off the issue, and later noted that “[i]t may yet prove correct to apply the [*AGC*] test.” *GPU II*, 540 F. Supp. 2d at 1097; *see also GPU I*, 527 F. Supp. 2d at 1026. The proper approach, however, is to decide *AGC* now, as standing is a threshold issue of antitrust pleading. *See AGC*, 459 U.S. at 521; *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007) (“[A]ntitrust standing is a threshold, pleading-stage inquiry”); *In re Refrigerant Compressors*, 2013 WL 1431756 at *11 (same).

At bottom, Special Master Legge was correct in relying upon the individualized, state-by-state authority cited by the Defendants, which provides more than sufficient evidence that *AGC* applies to the DAPs’ claims under Arizona, Michigan, and Illinois law — in addition to California and Washington, which the DAPs concede.

B. Special Master Legge Correctly Determined That The DAPs Who Only Purchased Finished Products Containing CRTs Did Not Suffer Antitrust Injury, And Thus Lack Antitrust Standing Under *AGC*

Special Master Legge also correctly recommended that the DAPs lack antitrust standing for their claims under these five states pursuant to *AGC*. Specifically, Special Master Legge concluded that as purchasers and retailers of finished products containing CRTs, and not CRTs themselves, the DAPs have failed to plead “antitrust injury”— the first and “most critical” of the *AGC* factors. Report at 10–11; *Bhan v. NME Hosp., Inc.*, 772 F.2d 1467, 1470 n.3 (9th Cir. 1985). That is because “[t]o meet the requirements of *AGC*, plaintiffs must be participants *in the same allegedly restrained market* in order to prove antitrust injury.” Report at 10 (citing *Bhan*, 772 F.2d at 1470) (emphasis in original). In concluding that there is a “real market distinction, and hence a real legal distinction,” between the market for finished products (which the DAPs participate in) and the market for CRTs (which they do not participate in), *see id.*, Special Master Legge’s recommendation is supported by decades of Ninth Circuit precedent. *See, e.g., Bhan*, 772 F. 2d at 1470; *Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1057 (9th Cir. 1999) (“[p]arties whose injuries

1 . . . are experienced in another market *do not suffer antitrust injury*”) (emphasis added). As
 2 Special Master Legge determined, the allegedly restrained market in this case is the market
 3 for standalone CRT tubes, and the DAPs do not and cannot purport to be participants in that
 4 market, which is fatal to their claims under AGC. Report at 10–11 (“they *must* be in the
 5 market for the sale of *CRTs*, *not* the market for the sale of *finished products*”) (emphasis
 6 added); *see also In re Refrigerant Compressors*, 2013 WL 1431756 at *12 (rejecting
 7 “‘component theory’ of antitrust standing” where plaintiffs participate in a secondary
 8 market).

9 Nor have the DAPs shown that their allegations meet either of the categories for
 10 market participation enumerated by the Ninth Circuit (*i.e.*, that the televisions and computer
 11 monitors bought and resold by the plaintiffs are “reasonably interchangeable,” or experience
 12 “cross-elasticity of demand,” with CRTs).⁸ *See, e.g., Bhan*, 772 F.2d at 1470-71. Because
 13 the DAPs cannot allege either of the two factors for market participation required by the
 14 Ninth Circuit, they instead simply allege, without more, that “the market for CRTs and the
 15 market for the products into which they are placed are inextricably linked and intertwined
 16 because the CRT market exists to serve the CRT Products markets.” *See, e.g., P.C. Richard*
 17 *Compl.* ¶ 90; *CompuCom Compl.* ¶ 86; *Costco Compl.* ¶ 69; *Office Depot Compl.* ¶ 85;
 18 *Electrograph Am. Compl.* ¶ 96.⁹ While the DAPs appear to contend that the mere
 19

20 ⁸ The DAPs cannot reasonably allege that CRTs are “reasonably interchangeable” with
 21 televisions and computer monitors. As a matter of common sense, no consumer would
 22 reasonably view a CRT standing alone as a replacement for a television or computer
 23 monitor. Similarly, the DAPs have not alleged, and could not reasonably allege, that there
 24 exists “cross-elasticity of demand” between CRTs and televisions or computer monitors.
 The DAPs cannot logically posit that consumers would purchase stand-alone CRTs if the
 prices of televisions or computer monitors increased.

25 ⁹ The DAPs cannot rely on the narrow reasoning in *Blue Shield of Va. v. McReady*, 457 U.S.
 26 465, 483 (1982), or *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 744-47 (9th Cir. 1984), to
 27 support their conclusory assertion that the CRT market and television/computer monitor
 28 markets are “inextricably intertwined.” *McCreedy* concerned a patient whose insurance
 claims were denied specifically because of allegedly anti-competitive conduct in the
 relevant market. Thus, her injury was, in fact, “inextricably intertwined” with the alleged

1 incantation of the phrase “inextricably linked and intertwined” is sufficient to confer antitrust
 2 standing, *see* DAPs’ Br. at 8, 11, courts in the Ninth Circuit have squarely held that the
 3 “simple invocation of the phrase ‘inextricably intertwined’ will not allow a plaintiff to avoid
 4 the fundamental requirement for antitrust standing that he or she have suffered any injury of
 5 the type . . . that the antitrust laws were intended to prevent.”¹⁰ *Lorenzo v. Qualcomm, Inc.*,
 6 603 F. Supp. 2d 1291, 1301 (S.D. Cal 2009) (internal citations omitted); *Datel Holdings Ltd.*
 7 *v. Microsoft Corp.*, 712 F. Supp. 2d 974, 994 (N.D. Cal. 2010) (dismissing plaintiff’s claim
 8 for lack of antitrust standing despite allegations that the plaintiff’s injury “was inextricably
 9 intertwined . . . in the primary market,” because its “allegations center on its injury in the
 10 secondary market, even though Plaintiff attempts to convert spillover effects in the secondary
 11 market into an injury in the primary market”).

12 Additionally, the DAPs have no basis to argue that the Report “conflicts” with “this
 13 Court’s prior decision” in an earlier stage of these proceedings with respect to the IPPs. *See*
 14 DAPs’ Br. at 5, 9-10. Indeed, the DAPs already made this argument to Special Master
 15 Legge, who considered and rejected it. Report at 10–11; *In re CRT*, 738 F. Supp. 2d at
 16 1023–24. As Special Master Legge cogently explained, “there is a simple reason why that
 17 holding is inapplicable to the complaints in these direct action cases. That is, the complaints
 18 that were before your Honor . . . were ones in which *both* cathode ray *tubes* and *finished*
 19 *products* were the alleged subjects of the conspiracy.” Report at 10 (emphasis in original).
 20 Here, however, the DAPs have withdrawn any allegations of a conspiracy to fix the prices of
 21

22 wrongdoing. *McCready*, 457 U.S. at 484. Here, by contrast, the DAPs’ allegations concern
 23 a wholly different market altogether. And in *Ostrofe*, the plaintiff was an “essential
 24 participant in the scheme to eliminate competition,” which is not the case here. 740 F.2d at
 745-46.

25 ¹⁰ In support of their bare and unsupported allegations that the market for finished products
 26 is “inextricably linked” with the market for CRTs, the DAPs rely on an inapposite *summary*
 27 *judgment* decision in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2012
 28 WL 4808447 (N.D. Cal. Oct. 9, 2012), in which Plaintiffs were able to “present[] evidence”
 of such a linkage. DAPs’ Br. at 11. The DAPs have not and cannot present any such
 evidence here.

1 finished products containing CRTs, and thus the DAPs can no longer benefit from the
2 nebulous allegations that the DAPs purchased “CRT Products,” an ambiguous term that
3 plainly does *not* mean just CRTs themselves. This creates “a clear differentiation between
4 the allegations of these direct action complaints and those that were before Your Honor in the
5 prior [IPP] motion.” Report at 10.

6 In addition to this fundamental distinction, the allegations in the DAPs’ complaint
7 also materially differ from those in the IPP complaint. In fact, contrary to their claims, the
8 DAPs have *not* “made virtually identical allegations” as the IPPs. *See* DAPs’ Br. at 9. For
9 example, the DAPs have not alleged that the *cost or price* of standalone CRT tubes are
10 components that “can easily be traced” through relevant distribution channels, or that
11 standalone CRT tubes account for a specific percentage of the cost of manufacturing the
12 finished product.¹¹ *Compare* the DAPs’ Complaints with IPP Compl. ¶ 228–30, 231.
13 Moreover, two of the states that are the subject of this motion, Illinois and Washington, were
14 not even at issue in the MDL decision.¹² In short, as Special Master Legge recognized, this
15

16
17 ¹¹ The presence of such allegations in the IPP Complaint played an important role in this
18 Court’s March 2010 decision; Judge Armstrong’s decision in *Flash*; as well as in *LCD* and
19 *GPU*. *Compare* allegations cited in DAPs’ Br. at 13–14 with *In re CRT*, 738 F. Supp. at
20 1024 (relying upon allegations regarding component percentage cost and price traceability),
21 *Flash*, 643 F. Supp. 2d at 1155 (“the Complaint expressly alleges . . . [t]racing can help
22 show that changes in the prices . . .”) (alteration in original), *In re TFT-LCD Antitrust Litig.*,
23 586 F. Supp. 2d 1109, 1123 (N.D. Cal. 2008) (“just as LCD panels can be physically traced
24 through the supply chain, so can their price be traced . . .”), and *GPU II*, 540 F. Supp. 2d at
25 1098 (“[P]laintiffs have pleaded that the price of the GPU is traceable . . .”). The DAPs,
26 though, are analogous to plaintiffs in *DRAM*, where the “complaint set[] forth no allegations
27 that . . . the ultimate cost of the DRAM component is somehow directly traceable and/or
28 distinguishable.” *DRAM I*, 516 F. Supp. 2d at 1092.

¹² Because antitrust standing is predicated on the scope of the individual *Illinois Brick*
repealer states’ laws, it is dispositive that both Illinois and Washington preclude a finding of
antitrust standing in these circumstances. *See Cnty. of Cook*, 817 N.E. 2d at 1045
(dismissing amended complaint upon finding that plaintiffs had not shown antitrust injury,
citing *AGC*); *Blewett v. Abbott Labs.*, 938 P.2d 842 (Wash. Ct. App. 1997) (denying
antitrust standing to indirect purchasers).

1 Court's prior holding with respect to the IPP Complaint is "not applicable to the complaints
2 in these direct action cases." Report at 10–11.

3 Special Master Legge thus correctly found that to the extent any of the DAPs seek
4 recovery for purchases of finished products that merely incorporate CRTs — such as
5 televisions and computer monitors — as opposed to CRTs standing alone, they cannot satisfy
6 AGC's antitrust injury requirement. These claims should thus be dismissed with prejudice.
7 *See infra* Section I.E.

8 **C. Special Master Legge Properly Found The Antitrust Injury Factor To Be**
9 **Dispositive To His Analysis**

10 Finding the absence of antitrust injury "essential to the analysis," Special Master
11 Legge determined that he need not address "the other deficiencies claimed by Defendants
12 regarding [the DAPs'] compliance with AGC's requirements." Report at 11. In claiming that
13 Special Master Legge erred in this regard, *see* DAPs' Br. at 5, the DAPs argue that an
14 antitrust plaintiff may survive a motion to dismiss even in the absence of antitrust injury.
15 The DAPs are wrong. In fact, it is well-settled that a showing of antitrust injury is *necessary*
16 — although not always sufficient — to establish antitrust standing. *Cargill, Inc. v. Monfort*
17 *of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986); *see also* *DRAM I*, 516 F. Supp. 2d at 1084–85.
18 Consequently, in the absence of a showing of antitrust injury, no further balancing is
19 necessary under AGC. *See* *DRAM II*, 536 F. Supp. 2d at 1136 ("[A] plaintiff may only
20 pursue an antitrust action if it can show antitrust injury"); *Toscano v. PGA Tour, Inc.*, 201 F.
21 Supp. 2d 1106, 1116 (E.D. Cal. 2002) ("[T]he absence of antitrust injury is fatal."); *Carter v.*
22 *Variflex, Inc.*, 101 F. Supp. 2d. 1261, 1268 (C.D. Cal. 2000) ("[P]roof of antitrust injury is
23 often a dispositive issue in antitrust litigation."); *In re LIBOR-Based Fin. Instruments*
24 *Antitrust Litig.*, No. 11-MD-2262(NRB), 2013 WL 1285338, at *11 (S.D.N.Y. Mar. 29,
25 2013) (finding that plaintiffs "have not plausibly alleged that they suffered antitrust injury,
26 thus, on that basis alone, they lack standing") (emphasis added); *see also* *Lucas v. Bechtel*
27 *Corp.*, 800 F.2d 839, 844 (9th Cir. 1986) ("The first factor is of tremendous significance.")
28 (internal citation omitted).

1 Indeed, other courts have applied the *AGC* test in the exact manner as Special Master
2 Legge. In *DRAM II*, for example, Judge Hamilton declined “to pass conclusively on the
3 merits of the remaining *AGC* factors” once she determined that plaintiffs did not establish an
4 antitrust injury, “given the added weight that the court gives the importance of the antitrust
5 injury factor.” *DRAM II*, 536 F. Supp. at 1141 (citing *Am. Ad Mgmt.*, 190 F.3d at 1055); *see*
6 *also In re LIBOR-Based Fin. Instruments*, 2013 WL 1285338, at *11 (concluding that in the
7 absence of antitrust injury, “[w]e need not reach the [other] *AGC* . . . factors.”). Special
8 Master Legge properly applied the *AGC* test in accord with those courts.

9 **D. The DAPs Have Also Failed To Satisfy The Remaining *AGC* Factors**

10 For the above reasons, Special Master Legge did not even need to reach the other
11 *AGC* factors, but the DAPs fail to satisfy them in any event. With respect to the “directness”
12 of the alleged injury — the second *AGC* factor — the DAPs have not made any allegations to
13 support a “causal connection” between their alleged injury and the anticompetitive conduct
14 that is alleged to have occurred in the separate market for CRT tubes. *AGC*, 459 U.S. at 537;
15 *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 147 (9th Cir. 1989).

16 The DAPs’ allegations that “Defendants ensured that price increases for CRTs were
17 passed on to indirect purchasers of CRT Products”¹³ merely confirm that the DAPs were
18 participants in a completely different market than the market for the allegedly price-fixed
19 product. For example, P.C. Richard alleges that “Plaintiffs have participated in the market
20 for CRTs through their direct purchases from Defendants of CRT Products containing price-
21 fixed CRTs and their purchases of CRT Products containing price-fixed CRTs indirectly
22 from non-defendant OEMs and others.” P.C. Richard Compl. ¶ 91. This allegation only
23 proves that any alleged injury was insufficiently direct, since the DAPs *admit* that they are
24 participants in a market for finished products containing CRTs, *not* in the wholly different
25 market for CRTs themselves. Put together with the DAPs’ own admission that there is no
26 conspiracy as to finished products containing CRTs, the DAPs’ concession that they

27 ¹³ *See* CompuCom Compl. ¶ 126; Electrograph Am. Compl. ¶ 136; Office Depot Compl.
28 ¶ 125; Circuit City Compl. ¶ 128; Polaroid Compl. ¶ 120; Costco Compl. ¶¶ 108, 184.

1 participate in a separate market negates their conclusory claim that “Plaintiffs purchased
2 price-fixed goods . . . from Defendants.” *Id.* ¶ 83.

3 The DAPs’ allegations of injury are also inherently speculative — the third of the
4 AGC factors. As in AGC, the claims of any of the DAPs who merely allege a downstream
5 purchase of goods other than CRTs “rest[] at bottom on some abstract conception or
6 speculative measure of harm.” 459 U.S. at 543 (internal citations and quotations omitted).
7 The DAPs’ naked assertions of pass-on further emphasize the complexity of any pass-on
8 analysis that might be required. In *DRAM I*, Judge Hamilton explained that where plaintiffs
9 are “in secondary markets in which they purchase the price-fixed product as a component,”
10 they “would need to allege that the secondary market sellers themselves were in an oligopoly
11 and fixing prices, in order to demonstrate non-speculative damages.” *DRAM I*, 516 F. Supp.
12 2d at 1092. In light of the DAPs’ admission that there is no such “secondary market”
13 conspiracy,¹⁴ mere conclusory allegations of “pass-on” are not sufficient to “demonstrate
14 non-speculative damages.” *Id.*; see also *In re Refrigerant Compressors*, 2013 WL 1431756
15 at *14 (“finished products that contain [CRTs] contain numerous other components, all of
16 which collectively determine the final price paid by retail consumers or ‘endpayors.’”). Thus,
17 the DAPs’ allegations fail under the third AGC factor as well.

18 Finally, the last of the AGC factors — “the risk of duplicate recoveries on the one
19 hand” and “of complex apportionment of damages on the other” — also weigh in favor of
20 denying the DAPs standing. 459 U.S. at 543–44.¹⁵ Purchasers of CRTs themselves — *i.e.*,

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22
23 ¹⁴ See CompuCom Compl. ¶ 87; Electrograph Am. Compl. ¶ 97; Office Depot Compl. ¶86;
24 Circuit City Compl. ¶ 89.

25 ¹⁵ The DAPs maintain that simply because the states at issue repealed the *categorical* bar on
26 recovery set forth in *Illinois Brick*, 431 U.S. at 720, these states are not concerned about the
27 complexity of proving up damages. DAPs’ Br. at 14–15. A state law plaintiff, though, does
28 not automatically obtain antitrust standing simply by being an “indirect purchaser” in an
“*Illinois Brick* repealer state.” See *In re Refrigerant Compressors*, 2013 WL 1431756 at
*10 (rejecting argument that “repealer jurisdictions simply allow all indirect purchaser
plaintiff actions to go forward”). Indeed, DAPs’ argument ignores that courts in repealer

those in the CRT market — are the properly situated parties to bring any claim for damages due to alleged antitrust violations in that market. *See In re Refrigerant Compressors*, 2013 WL 1431756 at *14 (“there can be no dispute that there are more direct victims of the alleged antitrust conspiracy — individuals and entities who directly purchased [CRTs].”). Extending antitrust standing to purchasers of downstream products that merely incorporate CRTs runs the risk of inappropriately doubling the potential plaintiff pool to include parties much further down the distribution and supply chain. The Supreme Court has also recognized a “strong interest” in “keeping the scope of complex antitrust trials within judicially manageable limits.” *AGC*, 459 U.S. at 543-44. Proving pass-on from a component sale to a finished product sale involves economic issues that are exceedingly complex. *See Meyer v. Qualcomm Inc.*, No. 08cv655 WQH (LSP), 2009 WL 539902, at *7 (S.D. Cal. Mar. 3, 2009); *DRAM I*, 516 F. Supp. 2d at 1092 (noting that damages in a component case “would be difficult to apportion”); *see also GPU I*, 527 F. Supp. 2d at 1026 n.7 (“Further clouding the standing issue is that not all plaintiffs . . . purchased their computers in the same way This has serious implications for the question of whether or not any overcharges were passed on to the consumer.”); *In re Refrigerant Compressors*, 2013 WL 1431756 at *14 (concluding that alleged “indirect injuries would render damages highly speculative and would involve an incredibly complex — if not impossible — apportionment of damages”). The DAPs include conclusory assertions of pass-on but no allegations of traceability of the cost attributable to the component, demonstrating that any damages sought, beyond being inherently speculative, may also result in unreasonably complex apportionment. *Id.*

E. The DAPs’ Claims Under The Five States At Issue Should Be Dismissed With Prejudice

The DAPs’ claims under the relevant five states should be dismissed for lack of antitrust standing with prejudice and without leave to amend. Any amendment would be futile since it will be impossible for the DAPs to establish the predicate for antitrust injury,

states routinely apply *AGC in its totality* in finding that indirect purchaser suits may only proceed where plaintiffs’ claims are not inherently speculative and unreasonably complex.

— *i.e.*, their participation in the market for CRTs, rather than finished products — merely by repleading. *See, e.g., Ventress v. Japan Airlines*, 603 F.3d 676, 680 (9th Cir. 2010) (district courts have discretion to deny leave to amend “when amendment would be futile”). Indeed, the DAPs will not be able to “address the established fact that the [allegedly price-fixed] products are just the CRTs, and that is the market in which [the DAPs] must address their alleged antitrust injury.” Report at 11. In short, the DAPs cannot cure the absence of antitrust standing by artful pleading alone.

The Defendants thus respectfully request that the Court adopt Special Master Legge’s recommendation that the Court dismiss the DAPs’ state law claims under the laws of California, Washington, Arizona, Illinois, and Michigan for lack of antitrust standing, and also do so with prejudice.

II. THE REPORT CORRECTLY CONCLUDES THAT THE DAPS HAVE FAILED TO STATE CLAIMS UNDER THE MASSACHUSETTS CONSUMER PROTECTION ACT

This Court on two different occasions properly dismissed claims for failure to comply with the requirements of the Massachusetts Consumer Protection Act, and the DAPs fail to provide any legitimate reason for this Court not to do so again. The DAPs contend that this Court “never ruled substantively on this issue” because the dismissal of previous Massachusetts claims by Special Master Legge was never challenged through the report and recommendation objection process. The DAPs’ straw man argument ignores the fact that the Indirect Purchaser Plaintiffs accepted these rulings when they chose not to challenge them.¹⁶

A claim under the Massachusetts Consumer Protection Act requires “a written demand for relief” to be served on a defendant “at least thirty days prior to the filing of any such action.” *See* Mass. G.L. c. 93A, § 9(3). The requirements of this demand are

¹⁶ *See* Report, Recommendations and Tentative Rulings Regarding Defendants’ Motion to Dismiss (Dkt. No. 597) (Feb. 5, 2010) at 29-30; Order Approving and Adopting Special Master’s Report, Recommendations and Tentative Rulings re: Defendants’ Motions to Dismiss (Dkt. No. 665) (Mar. 30, 2010); Report, Recommendations and Tentative Rulings Regarding Defendants’ Joint Motion to Dismiss the Second Consolidated Amended Complaint of the Indirect Purchaser Plaintiffs (Dkt. No. 768) (Sept. 30, 2010) at 12-14.

1 unambiguous and are required for a plaintiff to plead properly a valid cause of action as a
 2 matter of law. *McKenna v. Wells Fargo Bank, N.A.*, 693 F.3d 207, 217-18 (1st Cir. 2012)
 3 (demand letter requirement “is not merely a procedural nicety, but, rather, ‘a prerequisite to
 4 suit’”) (citation omitted) (quoting *Entrialgo v. Twin City Dodge, Inc.*, 333 N.E.2d 202, 204
 5 (Mass. 1975)). The DAPs’ objections to the Report never claim that the DAPs’ complaints
 6 alleged service of the demand letter required under Massachusetts law — nor could they —
 7 as no such demand letters were timely served.¹⁷ Without such an allegation, Special Master
 8 Legge correctly dismissed the relevant claims. *See Linton v. New York Life Ins. & Annuity*
 9 *Corp.*, 392 F. Supp. 2d 39, 42 (D. Mass. 2005) (complaint that “contains no indication or
 10 assertion that such demand occurred . . . fails to state a cognizable claim for relief”); *In re*
 11 *Sheedy*, 480 B.R. 204, 217-18 (Bankr. D. Mass. Sept. 27, 2012) (demand letter is “a
 12 prerequisite to suit and as a special element must be alleged and proved”).

13 The DAPs once again attempt to avoid this bright-line rule by referring to exhibits
 14 that they attached to their Opposition to Defendants’ Motion to Dismiss.¹⁸ This tactic fails
 15 for three reasons. First, the Defendants’ Motion to Dismiss was limited to the pleadings and
 16 any reliance on facts outside the four corners of the DAPs’ complaints would be improper.
 17 *See Reliance Ins. Co. v. City of Boston*, 884 N.E.2d 524, 528 (Mass. App. Ct. 2008) (court’s
 18 inquiry limited to four corners of complaint, “matters of public record, orders, items
 19 appearing in the record of the case, and exhibits attached to the complaint.”). Second, even if
 20 the Court were to consider these exhibits (which it should not), the demand letters were not
 21 issued “prior to filing” the complaints, as the DAPs state. The demand letters attached to the
 22 DAPs’ Opposition were instead sent to defendants on November 14, 2011 — the *same day*
 23 the complaints were filed — rather than 30 days *before* the complaint as the Massachusetts
 24

25 ¹⁷ *See* Target Am. Compl. ¶ 274(a)-(f) (no allegation of a demand letter being sent to any
 26 defendant); Tweeter Compl. ¶¶ 238-245 (same).

27 ¹⁸ *See* Declaration of Philip J. Iovieno in Support of Direct Action Plaintiffs’ Opposition to
 28 Defendants’ Joint Motion to Dismiss and For Judgment on the Pleadings (Dkt. No. 1384-1)
 and exhibits thereto (Dkt. No. 1384-2).

1 statute requires. *See* Mass. G.L. c. 93A, § 9(3) (“At least thirty days prior to the filing of any
2 such action, a written demand for relief . . . shall be mailed or delivered to any prospective
3 respondent.”). Third, many of the demand letters are deficient on their face. For example,
4 the demand letters sent to the Philips Defendants were sent to an incomplete and
5 undeliverable address: “Philips Electronics North America Corporation, 1251 Avenue of the
6 Americas, NY, NY 0.”¹⁹ It should come as no surprise to the DAPs that “Defendants never
7 responded” since the DAPs failed to send their tardy demand letters to a valid address.
8 Because the DAPs did not allege and, in fact, failed to send a valid demand letter 30 days
9 prior to filing a complaint as required under the Massachusetts Consumer Protection Act, the
10 Report correctly dismissed the DAPs’ Massachusetts claims without leave to amend.

11 **III. THE REPORT CORRECTLY CONCLUDES THAT THE DAPS HAVE**
12 **FAILED TO STATE A CLAIM UNDER THE WASHINGTON CONSUMER**
13 **PROTECTION ACT**

14 The Court should adopt Special Master Legge’s recommendation that the DAPs’
15 claims under Washington law be dismissed without leave to amend. The DAPs make the
16 remarkable assertion that “the parties agree and the Special Master acknowledges that
17 Washington courts generally follow federal court interpretations of the *Illinois Brick* rule.”
18 DAPs’ Br. at 19. As support for this contention, the DAPs cite only to Special Master
19 Legge’s Report and provide no Washington case law. Special Master Legge’s Report,
20 however, does not support the DAPs’ assertion and instead concludes that “the law is clear
21 that indirect purchasers are barred from bringing their own action by *Illinois Brick* . . . [and]
22 Washington law does not authorize private indirect purchasers to initiate suit.” Report at 12.
23 The Defendants and Washington courts do not agree that “Washington courts generally
24 follow federal court interpretations of the *Illinois Brick* rule,” DAPs’ Br. at 19, as case law
25 interpreting the Washington Consumer Protection Act has never permitted an indirect
26 purchaser to attain direct purchaser standing by utilizing any of the federal *Illinois Brick*

27 ¹⁹ *See* Exhibits 18-21; *see also* LG Defendants - Exhibits 10-12 (no zip code); Panasonic
28 Defendants - Exhibits 14-17 (same); Samsung SDI Co., Ltd. - Exhibit 24 (same), Toshiba
America Information Systems, Inc. - Exhibit 36 (same).

1 exceptions. The Court should reject the DAPs' invitation to broaden the standing
2 requirements under the Washington Consumer Protection Act, as neither the Washington
3 legislature nor any Washington court has ever provided that the *Illinois Brick* exceptions are
4 applicable to the Washington Consumer Protection Act. Therefore, the Court should adopt
5 Special Master Legge's recommendation and dismiss the DAPs' Washington Consumer
6 Protection Act claims with prejudice.²⁰

7 **IV. THE REPORT CORRECTLY CONCLUDES THAT THE POLAROID**
8 **PLAINTIFFS' COMMON LAW UNJUST ENRICHMENT CLAIM SHOULD**
9 **BE DISMISSED**

10 Special Master Legge appropriately recommends dismissing the Polaroid Plaintiffs'
11 common law claim for unjust enrichment because the Polaroid Plaintiffs have not invoked
12 the unjust enrichment laws of any particular state. Report at 12; Polaroid Compl. ¶¶ 212-
13 215. A plaintiff must indicate in a complaint which state's or states' laws the plaintiff is
14 relying upon to allege a claim for unjust enrichment. In *In re Static Random Access Memory*
15 *Antitrust Litigation* ("SRAM"), the court held that the plaintiffs' failure to identify which
16 state's or states' common law supported the plaintiffs' claims "deprives Defendants of
17 adequate notice of the claims." 580 F. Supp. 2d 896, 910 (N.D. Cal. 2008). In that case, the
18 court dismissed the Plaintiffs' claim for unjust enrichment, reasoning that, "until Plaintiffs
19 indicate which States' laws support their claim, the Court cannot assess whether the claim
20 has been adequately plead." *Id.* The complaint at issue in *SRAM* was similar to the Polaroid
21 Plaintiffs' complaint because it brought claims under the laws of specific states, but it did not
22 indicate under which of those states it was bringing its unjust enrichment claim. *See id.* at
23 899-900 ("The IPC alleges a violation of [section] 1 of the Sherman Act, violation of

24 ²⁰ In their Objections to the Report, the DAPs request *for the first time* that the Court clarify
25 that its ruling has "no bearing on the Washington Attorney General's right to pursue indirect
26 purchaser claims nor on Costco's ability to recover pursuant to the Attorney General's
27 action." DAPs' Br. at 19. The Court should reject the request as the issue is not properly
28 before the Court and is irrelevant to the pending Motion to Dismiss. *Zamani v. Carnes*, 491
F.3d 990, 997 (9th Cir. 2007) (stating that "[t]he district court need not consider arguments
raised for the first time in a reply brief.").

1 California's Cartwright Act, California Business and Professions Code [section] 16720,
2 violation of California Business and Professions Code [section] 17200, violations of
3 numerous other States' antitrust and unfair competition laws, violations of numerous other
4 States' consumer protection and unfair competition laws, and unjust enrichment and
5 disgorgement of profits."'). Similarly, the Polaroid Plaintiffs bring claims arising under the
6 antitrust statutes of Minnesota and California, but they do not identify the state or states
7 under which they bring their unjust enrichment claim(s), and thus "the Court cannot assess
8 whether the claim has been adequately plead." *Id.*

9 It is particularly important for a plaintiff to identify specifically which state's or
10 states' laws support its claim for unjust enrichment because the elements of unjust
11 enrichment vary by state, and some states do not even recognize unjust enrichment as a
12 stand-alone claim. *See, e.g., Nelson v. Xacta 3000 Inc.*, No. 08-5426 (MLC), 2009 WL
13 4119176, at *7 (D.N.J. Nov. 24, 2009) ("New Jersey law does not recognize unjust
14 enrichment as an independent tort cause of action."); *Jogani v. Superior Court*, 165 Cal. App.
15 4th 901, 911 (2008) ("[U]njust enrichment is not a cause of action.").

16 The Polaroid Plaintiffs argue that they specifically identify Minnesota and California
17 as "the two states' laws from which their claims arise." DAPs' Br. at 19. However, the
18 Polaroid Plaintiffs' conclusion would require the Court and the Defendants to make an
19 inference that falls far short of the standard set forth in Rule 8(a)(2) of the Federal Rules of
20 Civil Procedure, of a "short and plain statement of the claim." At no point in their complaint
21 do the Polaroid Plaintiffs indicate that their unjust enrichment claims arise under Minnesota,
22 California, or any other state's laws; rather, the Polaroid Plaintiffs plead as follows: "Fifth
23 Claim for Relief: Unjust Enrichment and Disgorgement of Profits . . . Under common law
24 principles of unjust enrichment, Defendants should not be permitted to retain the benefits
25 conferred via overpayments by Plaintiffs." Polaroid Compl. ¶ 214. It is clear from reading
26 the Polaroid Plaintiffs' complaint as a whole that they know how to identify the state laws
27 under which some of their claims arise, such as the Minnesota Antitrust Statute (*id.* at
28 ¶¶ 188-193), the California Cartwright Act (*id.* at ¶¶ 194-199), and the California Unfair

1 Competition Statute (*id.* at ¶¶ 200-211). However, they failed to do the same for their unjust
 2 enrichment claims. *Id.* at ¶¶ 212-215. If the Polaroid Plaintiffs’ argument — that Minnesota
 3 and California law are “the two states’ laws from which their claims arise” because they
 4 alleged that the Defendants purposefully availed themselves of the laws of those states — is
 5 correct, then California law would apply to their Minnesota Antitrust Statute claims and
 6 Minnesota law would apply to their California Cartwright Act and Unfair Competition
 7 Statute claims. Such a nonsensical result demonstrates that the Polaroid Plaintiffs’ reasoning
 8 is flawed. The Polaroid Plaintiffs have failed to make a “short and plain statement of the
 9 claim,” and instead have left the Court and the Defendants guessing about which state’s or
 10 states’ laws they are seeking to invoke. Furthermore, given that under California law there is
 11 no standalone claim for unjust enrichment, the Polaroid Plaintiffs’ assertion that their
 12 “[c]omplaint makes clear” that California and Minnesota’s laws are being invoked is
 13 mistaken. *See, e.g., Jogani*, 165 Cal. App. 4th at 911 (“[U]njust enrichment is not a cause of
 14 action.”).

15 The Polaroid Plaintiffs cite to *Fontana v. Haskin*, 262 F.3d 871, 877 (9th Cir. 2001)
 16 in support of their argument that they have sufficiently pled their common law unjust
 17 enrichment claim. DAPs’ Br. at 20. However, that case is inapposite because it addressed
 18 the issue of whether the plaintiff pled sufficient facts regarding the defendants’ alleged
 19 misconduct to support her sexual harassment claim, but did not address the relevant issue in
 20 this case: whether a plaintiff must identify the state or states whose laws they wish to invoke
 21 in bringing a claim for unjust enrichment. *Fontana*, 262 F.3d at 876. Courts that have
 22 specifically addressed this issue have required plaintiffs to indicate which states’ laws
 23 support their claim. *See, e.g., SRAM*, 580 F. Supp. 2d at 910 (dismissing plaintiffs’ unjust
 24 enrichment claims because plaintiffs “must identify which State’s or States’ law they rely
 25 upon.”). Accordingly, Special Master Legge correctly concludes in his Report that the
 26 Polaroid Plaintiffs’ unjust enrichment claim should be dismissed.

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V. THE REPORT CORRECTLY CONCLUDES THAT CIRCUIT CITY'S CLAIMS FOR RESTITUTION AND UNJUST ENRICHMENT UNDER CALIFORNIA LAW SHOULD BE DISMISSED

Special Master Legge appropriately recommends dismissing Circuit City's stand-alone claims for restitution or unjust enrichment because the California Cartwright Act provides specific remedies for antitrust violations, which are adequate remedies at law. Report at 13. Although California courts are divided on the issue, the majority view holds that there is no stand-alone cause of action for restitution or unjust enrichment in California. *See, e.g., Munoz v. MacMillan*, 195 Cal. App. 4th 648, 661 (2011) ("There is no freestanding cause of action for 'restitution' in California."); *Jogani*, 165 Cal. App. 4th at 911 ("[U]njust enrichment is not a cause of action"); *McBride v. Boughton*, 123 Cal. App. 4th 379, 387 (2004) (affirming the dismissal of a claim for unjust enrichment and finding that "[u]njust enrichment is not a cause of action . . . or even a remedy"); *Melchoir v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003) ("[T]here is no cause of action in California for unjust enrichment.").

In these decisions, courts either reason that claims for unjust enrichment cannot be brought where there is already an available remedy at law or that unjust enrichment is merely a general principle that is synonymous with restitution. *See Munoz*, 195 Cal. App. 4th at 661 ("Common law principles of restitution require a party to return a benefit when the retention of such benefit would unjustly enrich the recipient; a typical cause of action involving such a remedy is 'quasi-contract'"); *Jogani*, 165 Cal. App. 4th at 911 (unjust enrichment is not a cause of action, but rather "it is a general principle underlying various doctrines and remedies, including quasi-contract"); *Melchoir*, 106 Cal. App. 4th at 793 (holding that the plaintiff's cause of action for unjust enrichment was based on the same allegations as his cause of action for conversion, it was preempted by the Copyright Act, and stating that "unjust enrichment is a general principle, synonymous with restitution"); *McBride*, 123 Cal. App. 4th at 387 (unjust enrichment is "a general principle, underlying various legal doctrines and remedies" and is "synonymous with restitution").

1 Circuit City urges the Court to adopt the minority view, as Judge Illston did in *In re*
 2 *TFT-LCD (Flat Panel) Antitrust Litig.*, when she held that a California unjust enrichment
 3 claim was a “valid theory of recovery.” No. M 07-1827 SI, 2011 WL 4345435, at *3-4 (N.D.
 4 Cal. Sept. 15, 2011). The majority rule and trend in California decisions, however, have
 5 clarified that unjust enrichment is not a cause of action in California. *See, e.g., Levine v.*
 6 *Blue Shield of Cal.*, 189 Cal. App. 4th 1117, 1138 (2010) (“Although some California courts
 7 have suggested the existence of a separate cause of action for unjust enrichment, this court
 8 has recently held that there is no cause of action in California for unjust enrichment . . .
 9 Unjust enrichment is synonymous with restitution”); *Charles Schwab & Co. v. Bank of Am.*,
 10 No. C 10-4913 JL, 2011 WL 1753805, at *5 (N.D. Cal. May 9, 2011) (describing unjust
 11 enrichment claim under California law as “a minority view”). Indeed, as recently as April
 12 2013, the Court recognized that there is no freestanding cause of action for unjust enrichment
 13 in California when it stated that “several recent decisions by the California Court of Appeals
 14 have held that ‘[u]njust enrichment is not a cause of action, just a restitution claim.’”
 15 *Herskowitz v. Apple, Inc.*, No. 12-CV-02131-LHK, 2013 WL 1615867, at *14 (N.D. Cal.
 16 Apr. 15, 2013) (citations omitted).

17 In support of its argument that unjust enrichment or restitution provides a valid claim
 18 for relief under California common law, Circuit City relies upon a series of non-price-fixing
 19 cases, all of which are irrelevant. Specifically, *Ghirardo v. Antonioli*, in which the Court
 20 allowed the plaintiff to plead a cause of action for unjust enrichment, does not apply here
 21 because the plaintiff in that case did not have an available remedy at law. 14 Cal. 4th 39, 47,
 22 50-51 (1996). Although a California statute had recently been enacted that might have
 23 provided a legal remedy to the plaintiff, the court found that the statute was enacted after the
 24 filing of the action and thus did not apply to the transaction at issue. *Id.* at 47. After
 25 determining that the statute did not apply, the court examined the “common law remedies
 26 available before the enactment of the [statute]” and concluded that the equitable theory of
 27 unjust enrichment was one of those remedies and was thus available to the plaintiff. *Id.* at
 28 50-51. Similarly, *Lectrodryer v. SeoulBank* also addressed an action in quasi contract

1 because there was not a binding, enforceable agreement between the parties and thus no
2 remedy at law. 77 Cal. App. 4th 723, 726 (2000). In this case, Circuit City *does* have an
3 adequate remedy at law, *i.e.*, the California Cartwright Act, so *Ghirardo* and *Lectrodryer* do
4 not apply.

5 Similarly, the other cases upon which Circuit City relies do little more than state
6 general principles regarding unjust enrichment and the facts of those cases are inapposite to
7 this matter. *See Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 684 (9th Cir. 2009)
8 (dismissing plaintiffs’ unjust enrichment claim for defendant’s profits resulting from
9 substandard labor practices); *Peterson v. Celco P’ship*, 164 Cal. App. 4th 1583, 1586 (2008)
10 (dismissing the plaintiffs’ unjust enrichment claim for defendant’s profits from offering and
11 selling insurance while not licensed to do so); *In re Easysaver Rewards Litig.*, 737 F. Supp.
12 2d 1159, 1180 (S.D. Cal. 2010) (following the minority view and citing a 1992 California
13 state case in allowing plaintiff to proceed with an unjust enrichment claim for the defendant’s
14 profits resulting from the fraudulent transmittal of credit card, debit card, and/or PayPal
15 information).

16 Moreover, it is well established under California law that equitable remedies are not
17 available when there is an adequate legal remedy. *See Martin v. Cnty. of L.A.*, 51 Cal. App.
18 4th 688, 696 (1996) (“Perhaps the most basic rule governing equity jurisdiction is that there
19 is no right to equitable relief or an equitable remedy when there is an adequate remedy at
20 law.”). Thus, as Special Master Legge recommended, “[t]here is no need to litigate equitable
21 forms of relief when the states’ statute provides specific causes of action and forms of relief
22 for the facts alleged in these complaints.” Report at 13.

23 Nonetheless, Circuit City argues that, under *Keilholtz v. Superior Fireplace Co.*,
24 No. C-08-00836 CW, 2009 WL 839076, at *5 (N.D. Cal. Mar. 30, 2009), the Court should
25 not yet determine the adequacy of the remedies available to it. DAPs’ Br. at 22 (citing
26 *Keilholtz* for the proposition that the Court should decline to decide whether unjust
27 enrichment is a stand-alone claim at all given “the early stage in the litigation,” despite the
28 *Keilholtz* court’s recognition that the claim “may ultimately be superfluous to the Plaintiffs’

1 restitution claim under the UCL”). Also in support of this argument, Circuit City states that,
 2 in *TFT-LCD*, 2011 WL 4345435 at *3-4, Judge Illston allowed Circuit City’s claims to
 3 proceed without determining the adequacy of other remedies at an early stage. These
 4 decisions, however, are in direct conflict with this Court’s own decision in *Rhynes v. Stryker*
 5 *Corporation*, in which this Court held that “[w]here the claims pleaded by a plaintiff *may*
 6 entitle her to an adequate remedy at law, equitable relief is unavailable.” No. 10-5619, 2011
 7 WL 2149095, at *4 (N.D. Cal. May 31, 2011) (Conti, J.) (emphasis added). The decisions
 8 relied upon by Circuit City are also directly in conflict with the April 15, 2013 decision in
 9 *Herskowitz*, in which the Court dismissed claims for unjust enrichment with prejudice
 10 because “several recent decisions by the California Court of Appeals have held that ‘unjust
 11 enrichment is not a cause of action.’” 2013 WL 1615867 at *14. Given that the California
 12 Cartwright Act provides Circuit City with an entirely adequate legal remedy and unjust
 13 enrichment is not a cause of action under California law, the Court should dismiss Circuit
 14 City’s equitable claim for unjust enrichment.

15 **VI. THE REPORT CORRECTLY CONCLUDES THAT INDIRECT**
 16 **PURCHASERS CANNOT BRING CLAIMS UNDER NEBRASKA AND**
 17 **NEVADA LAW FOR PURCHASES THAT PREDATE THE *ILLINOIS BRICK***
 18 **REPEALER STATUTES IN THESE STATES**

19 Special Master Legge recommended that the Court dismiss with prejudice the DAPs’
 20 claims under Nebraska and Nevada law based on purchases predating those states’ *Illinois*
 21 *Brick* repealer amendments. Report at 14. Special Master Legge based his recommendation,
 22 in part, on his previous analysis of these same statutes, including their legislative history and
 23 state court authorities. Report, Recommendations and Tentative Rulings (Dkt. No. 597), at
 24 28-29 (recommending that the Court dismiss indirect purchaser plaintiffs’ claims under
 25 Nebraska and Nevada law, to the extent they are based on pre-amendment purchases). This
 26 Court adopted Special Master Legge’s recommendations. *In re Cathode Ray Tube (CRT)*
 27 *Antitrust Litig.*, 738 F. Supp. 2d at 1025.

1 In the instant motion, the DAPs relied largely on the arguments and state court
2 authorities cited by the indirect purchasers, leading Special Master Legge to reach the same
3 result. Report at 14 (“Plaintiffs’ arguments in this motion are the same as those considered
4 and rejected by this Court previously.”). The DAPs are wrong to argue that Special Master
5 Legge “failed to consider” and “overlooked” two opinions from the Northern District of
6 California. DAPs’ Br. at 22-23. Those opinions — which reach mixed results on the state
7 laws at issue, and are at best persuasive authority — were cited and argued extensively to
8 Special Master Legge. Special Master Legge’s decision to not cite them does not mean he
9 failed to consider them.²¹ Rather, Special Master Legge rightly focused on controlling state
10 authorities which, as described below, require that the Court adopt the resulting
11 recommendations.

12 **A. The Court Should Dismiss The DAPs’ Nebraska Claims For Purchases**
13 **Made Prior To The July 20, 2002 Repealer Amendment**

14 Nebraska passed its *Illinois Brick* repealer amendment in 2002. L.B. 1278, 97th Leg.,
15 2d Sess. (Neb. 2002) (RJN Ex. A). The bill amended Nebraska’s Junkin Act to provide that
16 any person injured in his or her business or property by a violation of the Act may bring a
17 civil action, “whether such injured person dealt directly or indirectly with the defendant.”
18 *Id.*, p. 6; *see also* Neb. Rev. Stat. § 59-821. The repealer amendment was introduced to
19 “permit indirect parties, or parties within a distribution chain transacting business indirectly
20 with a price-fixing party, who have been harmed by an antitrust violation, a right to a remedy
21 in Nebraska. ***Currently in Nebraska, such indirect parties have no remedy.***” Kermit A.
22 Brashear, Introducer’s Statement of Intent, L.B. 1278 (Neb. Feb. 27, 2002) (RJN Ex. B)
23 (emphasis added); *see also* Committee Statement, Committee on Judiciary, L.B. 1278 (Neb.
24 Feb. 27, 2002) (RJN Ex. C) (“Currently, Nebraska law does not allow indirect parties within
25 a distribution chain who are harmed through a business transaction by an antitrust violation
26

27 ²¹ In making this argument, the DAPs misquote the Report. *Compare* Report at 14
28 (“Plaintiffs have cited no authority, and have provided no new reasons, why this Court
should reverse its earlier holdings.”) *with* DAPs’ Br. at 23.

1 the ability to sue for damages.”). The Nebraska Supreme Court has also acknowledged that
 2 the amendment “removed the bar against suits by an indirect purchaser plaintiff who dealt
 3 indirectly with the defendant by purchasing the defendant’s product from an intermediary,
 4 rather than directly from the defendant.” *Kanne v. Visa U.S.A., Inc.*, 723 N.W.2d 293, 300
 5 (Neb. 2006); *see also id.* (amendment “removed the automatic bar against indirect purchaser
 6 actions”). Thus, the Legislature and the state’s highest court agree that, before the repealer
 7 amendment became effective, Nebraska law did not allow indirect purchasers to sue for
 8 damages under the Junkin Act.

9 The DAPs argue to the contrary, citing *Arthur v. Microsoft Corp.*, 676 N.W.2d 29
 10 (Neb. 2004). However, *Arthur* analyzed a claim under Nebraska’s Consumer Protection Act,
 11 which the DAPs do not assert in this case. Furthermore, the *Arthur* opinion does not even
 12 mention the Junkin Act, which is the statute under which the DAPs assert a claim. The
 13 DAPs attempt to argue by analogy that, because Nebraska courts allowed indirect purchasers
 14 to sue under the Consumer Protection Act before the repealer amendment, “[c]ertainly it
 15 would follow” that courts would also allow indirect purchasers to sue under the Junkin Act
 16 for pre-repealer purchases. DAPs’ Br. at 24. But the DAPs cite no Nebraska authority to
 17 support this leap. In fact, such a holding would run contrary to the express statements of
 18 both the Nebraska Legislature and Supreme Court, cited above.

19 Thus, Nebraska courts would not have allowed indirect purchasers to sue under the
 20 Junkin Act prior to Nebraska’s *Illinois Brick* repealer amendment. In Nebraska, a
 21 “legislative act operates only prospectively and not retrospectively unless legislative intent
 22 and purpose that it should operate retrospectively is clearly disclosed.” *Soukop v. Conagra,*
 23 *Inc.*, 653 N.W.2d 655, 657 (Neb. 2002). Nebraska’s repealer reveals no such intent.
 24 Accordingly, the Court should adopt Special Master Legge’s Report on this issue and dismiss
 25 the DAPs’ claims under the Junkin Act based on purchases made before July 20, 2002 (the
 26 date the amendment became effective).

27
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B. The Court Should Dismiss The DAPs' Nevada Claims For Purchases Made Prior To The October 1, 1999 Repealer Amendment

Nevada passed its *Illinois Brick* repealer amendment in 1999. A.B. 108, 70th Sess. (Nev. 1999) (RJN Ex. D). The bill amended Nevada's Unfair Trade Practices Act to provide that "[a]ny person injured *or damaged directly or indirectly* in his business or property by reason of a violation" may institute a civil action. *Id.* § 2 (emphasis added); *see also* Nev. Rev. Stat. Ann. § 598A.210. The Nevada Legislature understood that it was changing then-existing law, which did not allow for indirect purchaser suits. *See* RJN Ex. D (summarizing bill as making "changes" regarding civil actions under the statute); *see also* Minutes of the Senate Committee on Commerce and Labor, A.B. 108, 70th Sess. (Nev. 1999) (RJN Ex. E), p. 2 ("the way the statutes are currently written, it is probable that indirect purchasers could not have an antitrust remedy in court."). This is due to a provision in the statute, mandating that it "shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes." Nev. Rev. Stat. Ann. § 598A.050. This includes *Illinois Brick's* ban on indirect purchaser suits.

The DAPs argue to the contrary, that Nevada never differentiated between direct and indirect purchasers under the Unfair Trade Practices Act. DAPs' Br. at 25. In support, the DAPs cite *Pooler v. R.J. Reynolds Tobacco Co.*, an unpublished decision from a Nevada trial court. No. CV-00-02674, 2001 WL 403167, at *1 (Nev. Dist. Ct. Apr. 4, 2001).²² However, the *Pooler* court itself acknowledged that, before the amendment, Nevada courts denied standing to indirect purchasers under the Unfair Trade Practices Act. *Id.* at *1. In any event, this Court is bound to follow the decisions of Nevada's highest court on issues of Nevada law, not unpublished decisions of its trial courts. *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 885 n.7 (9th Cir. 2000). Nevada courts *presume* that the state Legislature intended

²² Other Nevada trial courts have rendered decisions (also unpublished) reaching the opposite conclusion, and holding that Nevada's amendment allowing indirect purchaser suits does not apply retroactively. *See Krotz v. Microsoft Corp.*, No. A416361 (Nev. Dist. Ct. June 22, 2000) (not published in Lexis or Westlaw), *cited in* Am. Bar Ass'n, *Indirect Purchaser Litigation Handbook* 43 n.153 (2007).

1 to change the law when it amends a statute. *McKay v. Bd. of Supervisors*, 730 P.2d 438, 442
2 (Nev. 1986).

3 Thus, Nevada courts would not have allowed indirect purchasers to sue under the
4 Unfair Trade Practices Act before its 1999 amendment. In Nevada, “[t]he general rule is that
5 statutes are prospective only, unless it clearly, strongly, and imperatively appears from the
6 act itself that the legislature intended the statute to be retrospective in its operation.” *Estate*
7 *of Thomas*, 998 P.2d 560, 562 (Nev. 2000); *see also Castillo v. State*, 874 P.2d 1252, 1257
8 (Nev. 1994) (“legislative enactments responding to judicial interpretations of a statute by
9 affirmatively changing the statute are not ‘clarifications’ of original legislative intent, but are
10 *amendments* presumed to operate prospectively absent contrary legislative intent.”)
11 (emphasis in original), *disapproved on other grounds by Wood v. State*, 892 P.2d 944, 946
12 (Nev. 1995). Because the repealer amendment does not indicate any intent that it should be
13 applied retroactively to claims that accrued before its effective date, it should be applied only
14 prospectively. Consistent with these authorities, federal courts have held that indirect
15 purchasers cannot bring a claim under the statute based on events before the repealer’s
16 effective date. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M07-1827 SI, 2011 WL
17 3738985, at *4 (N.D. Cal. Aug. 24, 2011); *Ferrell v. Wyeth-Ayerst Labs., Inc.*, No. 1:01-cv-
18 00447-SBB-TSH, at 26 (S.D. Ohio July 1, 2004) (RJN Ex. F). The Court should do the
19 same, adopting Special Master Legge’s Report on this issue and dismissing any claims by the
20 DAPs under the Nevada statute based on purchases made before October 1, 1999 (the date
21 the amendment became effective).

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DEFENDANTS' JOINT MOTION TO ADOPT PORTIONS OF THE REPORT AND RECOMMENDATIONS
REGARDING DEFENDANTS' MOTIONS TO DISMISS DIRECT ACTION COMPLAINTS

Case No. 07-5944 SC

MDL No. 1917

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Depot Compl. and Best Buy Compl. only

23 Pursuant to Local Rule 5-1(i)(3), the filer attests that concurrence in the filing of this
24 document has been obtained from each of the above signatories.

CERTIFICATE OF SERVICE

On June 28, 2013, I caused a copy of the “DEFENDANTS’ JOINT MOTION TO ADOPT PORTIONS OF THE REPORT AND RECOMMENDATIONS REGARDING DEFENDANTS’ MOTIONS TO DISMISS DIRECT ACTION COMPLAINTS” to be electronically filed via the Court’s Electronic Case Filing System, which constitutes service in this action pursuant to the Court’s order of September 29, 2008.

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